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Nos. 83-432 and 83-616

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT H. GULLETT, PETITIONER

v.

UNITED STATES OF AMERICA

MARVIN FOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. No. 83-432: Whether the district court erred in allowing a government witness to claim the privilege against self-incrimination as to one question during cross-examination.

2. No. 83-616: Whether the admission into evidence of a tape recorded conversation, in which petitioner Gullett was a participant, containing brief references to petitioner Fox constituted plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A6-A26)[1] is reported at 713 F.2d 1203.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1983. Petitioner Fox's petition for rehearing was denied on August 31, 1983. The petition for a writ of certiorari in

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[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 83-432.

No. 83-432 was filed on September 14, 1983, and the petition in No. 83-616 was filed on October 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted on one count of conspiracy, in violation of 18 U.S.C. 371; one count of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); 13 counts of aiding and abetting the transportation of stolen, converted or fraudulently obtained securities, in violation of 18 U.S.C. 2314 and 2; and four counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952 and 2. Petitioner Gullett was additionally convicted on one count of obstruction of justice, in violation of 18 U.S.C. 1503, another count of transporting stolen securities, in violation of 18 U.S.C. 2314, and four counts of tax evasion, in violation of 26 U.S.C. 7201.[2] Gullett was sentenced to concurrent terms of seven years' imprisonment on the interstate transportation and RICO counts and five years' imprisonment on the remaining counts; Fox was sentenced to concurrent terms of five years' imprisonment on the RICO counts and six years on the remaining counts. Petitioners additionally were each fined $25,000. The court of appeals affirmed (Pet. App. A6-26).

1. The evidence at trial is set out in the opinion of the court of appeals (Pet. App. A6-A12). Briefly, it showed that petitioners, partners in the accounting firm of Gullett, Fox & Boyer, participated with co-conspirator Boyer[3] in a

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[2]At the close of the trial the district court acquitted Fox of obstruction of justice (Tr. 705). The jury also acquitted Fox on one count charging interstate transportation of fraudulently obtained securities.

[3]Wayne Boyer pleaded guilty to a conspiracy count and testified for the government.

scheme to transport from the United States to Canada $300,000 in checks drawn on accounts held by six corporations. The checks were cashed in Canada. Petitioners and their confederates kept a share of the laundered check proceeds, and the remaining funds were pocketed by other co-conspirators or used for various acts of commercial bribery. In all instances the checks were cashed by Robert Davis, a Canadian insurance agent who had a line of credit at a Windsor, Ontario bank.

Twelve counts of the indictment related to petitioners' participation in a check-cashing scheme engineered on behalf of Industrocraft, Inc., a corporate client of petitioners' firm. Joseph Leich, the chief operating officer of Industrocraft, asked petitioners for assistance in generating cash "to take care of some customers" (Tr. 325). On several occasions Leich wrote checks on Industrocraft's account to petitioners' accounting firm, recording the checks in the corporate books as "legal and accounting" expenses. Leich testified that Boyer, Davis and petitioners together took 50% of the face value of the checks and gave Leich the balance. In this manner petitioners arranged for checks totalling approximately $33,300 to be cashed in Canada. Four other Industrocraft checks totalling approximately $35,200 were drawn to Davis or to fictitious payees, and one $11,000 check made payable to Gullett, Fox & Boyer was cashed in the United States without Davis's assistance. Pet. App. A7-A8; Tr. 325-351, 455-465, 574-578.

2. Petitioner Gullett was also convicted of obstruction of justice in connection with his efforts to convince Leich to give false testimony before the grand jury. There was a factual dispute as to the amount of money Leich received back from the fraudulent checks he gave to petitioners' accounting firm to cash for him. Boyer had indicated that Leich received 90% of the face value of the checks; Leich, on the other hand, asserted that he received only one-half.

After Leich received a subpoena to testify before the grand jury, he spoke with Gullett about his upcoming appearance. In an apparent effort to make himself and Fox look less culpable, petitioner suggested that Leich tell the grand jury he received 90% of the full amount. Gullett also offered to pay whatever taxes Leich would then owe on the heretofore undeclared 40%. Leich told his attorney about petitioner Gullett's proposal and, in cooperation with federal authorities, recorded a subsequent conversation in which Gullett repeated his offer and suggestion of perjury. Tr. 353-356; 360-362, 391-395; Gov't Exh. 67. The government also introduced into evidence a scrap of paper bearing Gullett's notations on the amount of money Leich would need to compensate him for the taxes due (Gov't Exh. 69).

ARGUMENT

1. Petitioner Gullett contends (83-432 Pet. 10-21) that the district court erred in allowing government witness Joseph Leich to claim the privilege against self-incrimination as to one question during cross-examination. The court of appeals correctly rejected this claim (Pet. App. A13-A16).

On direct examination, Leich testified that he embarked upon the laundering scheme to generate "cash * * * to take care of some customers" and that he received back only one-half the face amount of each check (Tr. 325, 328, 331, 332, 336, 351). On cross-examination, when asked what he did with his share of the proceeds, Leich testified that he "passed it on to various people who do business with [Industrocraft], to bribe them" (Tr. 378). The government objected to the next question, which sought disclosure of the names of the bribe recipients.

At a sidebar conference, defense counsel urged that the question was relevant to Leich's credibility. Counsel stated that in light of a conflict between Leich and another co-conspirator (Boyer) as to how much money Leich received,

the defense might subpoena the named bribe recipients to explore whether Leich kept the disputed amount or paid it out in bribes (Tr. 379). After the court expressed its concern that the trial would thereby shift to collateral matters, counsel stated that he would not call the named bribe recipients as defense witnesses (Tr. 381, 384).

The court then raised the question of self-incrimination. Leich previously had pleaded guilty to two counts of the indictment and, in exchange, received informal immunity for offenses about which the government had knowledge and Leich had agreed to testify (Tr. 369). The understanding did not include any testimony by Leich concerning his payment of bribes (Tr. 375). Accordingly, Leich's counsel advised that the answers would be incriminating (Tr. 376-377).

Petitioner then urged that Leich had waived his Fifth Amendment privilege by earlier stating that he used the money to pay bribes (Tr. 375-376). Leich's attorney disagreed, stating that "the checks [petitioners are] asking my client about, those are over and done with. The names, however, of the people may, in fact, bring out other events, other criminal events that have nothing to do with those checks or those transactions" (Tr. 376). The court rejected petitioner's waiver claim (Tr. 377) and upheld Leich's claim of privilege, but allowed the defendant to elicit the invocation of the privilege in the jury's presence (Tr. 370-372, 380-382). Five days later, at the close of the government's case, petitioner reargued the point to the court. Again he urged that Leich waived his Fifth Amendment rights when he admitted paying bribes (Tr. 619-620). The district court found that Leich's statement on cross-examination that he paid bribes was not a waiver of his Fifth Amendment right with respect to the identity of the persons he bribed (Tr. 633).

Petitioner Gullett's counsel then asked the court to order the government to immunize Leich so that he could name the bribe recipients (Tr. 622), never suggesting, however, that he intended to call any recipient as a witness. The court declined to order immunity (Tr. 622-624), noting that defendants were pursuing a general attack on Leich unrelated to any issue in the case (Tr. 630, 633). The court did offer to give an instruction on the weight to be given to testimony by a witness who invokes the privilege against self-incrimination, but petitioner declined (Tr. 632-633).

Petitioner's contention (83-432 Pet. 13-16) that the court erred in allowing Leich to assert the privilege is not well-taken. While it is true that, when Leich admitted on cross-examination that he used the money to pay bribes, he thereby incriminated himself with respect to possible state bribery charges, additional details would have subjected him to "a 'real danger' of further crimination." *Rogers* v. *United States*, 340 U.S. 367, 374 (1951).[4] See also *United States* v. *Seifert*, 648 F.2d 557, 561 (9th Cir. 1980); *United States* v. *LaRiche*, 549 F.2d 1088, 1096 (6th Cir.), cert. denied, 430 U.S. 987 (1977). Contrary to petitioner's contention (83-432 Pet. 16) that federal immunity might have protected Leich from state bribery charges, Leich's attorney represented that disclosure of the bribe recipients "may, in fact, bring out other events, other criminal events that have nothing to do with those checks or those transactions" (Tr.

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[4]Under these facts, it is apparent that Leich did not knowingly and voluntarily waive his Fifth Amendment right when he blurted out his incriminatory response. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Consequently, the district court correctly declined to find (Tr. 377, 633) that Leich's admission constituted the kind of waiver that this Court addressed in *Rogers*, *supra*. Moreover, unlike *Rogers*, where "response to the specific question in issue * * * would not further incriminate [the witness]," 340 U.S. at 373, Leich clearly ran the risk of material additional self-incrimination had he responded.

376). Thus, these other unrelated activities would not have been embraced under the informal immunity agreement.[5]

The decision to exclude the names of the bribe recipients is not inconsistent with *Rogers* v. *United States*, 340 U.S. 367 (1951). Even if it be assumed that the fact of the bribes and the names of the recipients are " 'related facts, parts of a whole fact,' " *Rogers* instructs that waiver need not be found unless the " 'whole fact form[s] a single *relevant* topic,' " *id.* at 374 n.16, quoting 8 Wigmore, *Evidence in Trials at Common Law* § 2276 (1940) and *Foster* v. *People*, 18 Mich. 266 (1869) (emphasis added). In this case, neither the bribes nor the identities of their recipients were relevant to the issue of petitioner's guilt. Whether Leich obtained 50% or 90% of the illegally received funds, petitioner would not be exonerated of the Travel Act violations so long as he participated in the scheme. Since the factual conflict over Leich's share did not question petitioner's role (only the amount he received), petitioner's guilt was established under both versions. Thus, the court would have been well within its discretion in excluding that line of cross-examination as irrelevant, as the government contended in its initial objection, even before the Fifth Amendment issue arose. Petitioner disavowed an intent to call the named bribe recipients as defense witnesses (Tr. 381, 384). Hence, the question would merely have elicited names, for no discernible purpose other than to discredit Leich by further

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[5]Because these non-immunized transactions had nothing to do with the checks and transactions involved in this case, petitioner's hypotheticals (83-432 Pet. 20) concerning piecemeal immunity for the charges pending at trial are inapposite. In short, this case is not comparable to a situation where "[t]he Government by its fashioning of the terms of the non-prosecution agreement or immunity order, could cause testimony about the bribing of 'A,' but preclude it about 'B' " (*Ibid.*).

emphasizing that he paid bribes.[6] Leich's criminal disposition to that end was already established, however, as was an additional range of illegal activity involving tax fraud. The proposed impeachment value of this further line of inquiry, directed at Leich's general credibility, thus would have been cumulative at best.[7]

Petitioner Gullett also attacks (83-432 Pet. 16-21) the decision below as fostering improper selective manipulation by the government of its immunity powers. Assuming that "some extraordinary circumstances" may require total immunity "to protect a defendant's right to a fair trial" (*United States* v. *Chagra*, 669 F.2d 241, 258 (5th Cir. 1982)), this is not such a case. The government did not grant immunity only to foster its interests at the expense of petitioner's rights. Rather, the government granted immunity to Leich concerning offenses related to the charges against petitioner, and accordingly made Leich available for cross-examination as to his criminal conduct in that regard. That Leich's credibility was effectively attacked on those grounds is not subject to dispute. And further exploration of the

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[6]Petitioner states (83-432 Pet. 19-20) that "[t]hese alleged bribes were intimately related to the specific charges made against [petitioner] in this trial and to the credibility of Mr. Leich." As the court below properly recognized (Pet. App. A14-A15), though "intimately related" the bribes were not prerequisites to petitioner's Travel Act and Section 2314 convictions. As such, they were basically collateral matters, and the limited restriction imposed on cross-examination here did not pose a "substantial danger of prejudice by depriving [petitioner] of the ability to test the truth of [Leich's] direct testimony." *Fountain* v. *United States*, 384 F.2d 624, 628 (5th Cir. 1967), cert. denied, 390 U.S. 1005 (1968).

[7]And, because Leich was impeached on a variety of matters and the identity of the bribe recipients was collateral to the matters directly at issue, the court of appeals properly upheld the district court's refusal to strike Leich's direct testimony (Pet. App. A16). See *Fountain* v. *United States*, 384 F.2d at 628.

inconsistency between Boyer and Leich concerning how much money Leich received from the check cashing scheme would not have borne on the fundamental issues to be resolved at trial.

When petitioner's negligible need for Leich's testimony naming the bribe recipients is weighed against the significant societal costs of immunizing witnesses, his insistence that government witnesses be given blanket immunity for all past offenses so as to make them impeachable is clearly untenable. That is particularly so where, as here, no conceivable prejudice or unfairness flowed from the *de minimis* restriction on petitioner's ability to challenge Leich's credibility with non-exculpatory and immaterial matters.[8] Accordingly, review of petitioner's claim is unwarranted.[9]

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[8]Thus, petitioner's reliance (83-432 Pet. 17-19) on *Earl* v. *United States*, 361 F.2d 531, 534 & n.1 (D.C. Cir. 1966), and 388 U.S. 921 (1967), *United States* v. *Herman*, 589 F.2d 1191 (3d Cir. 1978), and *Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980) is misplaced. Those cases suggest that immunity for defense witnesses — and by analogy broader immunity for already-immunized government witnesses — may in certain extraordinary cases be necessary to remedy "prosecutorial misconduct" undertaken " 'with the deliberate intention of distorting the judicial fact finding process.' " *Id.* at 968, quoting *United States* v. *Herman*, 589 F.2d at 1204. This is plainly not such a case. Those cases, moreover, require as a threshold matter that the anticipated testimony would be both material and exculpatory, two necessary preconditions that also are not met here. See *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981).

[9]Furthermore, petitioner received concurrent sentences on each count. Because his offense severity rating under the Parole Commission guidelines (28 C.F.R. 2.20) would not change even if his convictions on the counts charging interstate transportation of Industrocraft's fraudulently made securities were reversed, there is no reason for this Court to consider his objection to Leich's testimony, which is limited to only some of the counts on which he was convicted. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n. 1 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969).

2. Petitioner Fox contends (83-616 Pet. 5-13) that the court below erred in finding that the admission of statements that allegedly violated *Bruton* v. *United States*, 391 U.S. 123 (1968), was harmless in the circumstances of this case.[10] This fact-bound claim is without merit.

The evidence at issue, which was the government's primary evidence on the obstruction of justice count, consisted of a consensually-made tape recording between Leich, who was then cooperating with the government, and Gullett (Gov't Exh. 68). In the recorded conversation, which took place several days before Leich was due to testify before the grand jury, Gullett made four brief references to petitioner Fox: Gullett said that he told petitioner that Boyer was "pretty * * * expensive" and that they didn't need to make any more money this way (Gov't Exh. 68 at 4); that Boyer had more "closed door sessions" in one week than he and Fox have in a year (*id.* at 6); that Fox seemed calm and oblivious to the trouble brewing and continued to do $35 tax returns (*id.* at 8); and that he (Gullett) told Fox that Boyer obtained separate representation to avoid having them find out what he was doing (*id.* at 12). Leich also referred to Fox when he asked Gullett if he and Fox would "cover" him and pay any tax due in the event that Leich falsely testified before the grand jury to receipt of money on the fraudulent checks that he did not claim on his tax returns (*id.* at 14). The day after this recorded conversation, Gullett telephoned Leich to reassure him that he and Fox were still behind Leich (Tr. 371).[11]

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[10]In *Bruton*, co-defendant Evans' confession that he and petitioner Bruton together committed the crime was admitted into evidence. This Court reversed, finding that the confession, which was not subject to cross-examination, "added substantial, perhaps even critical, weight to the Government's case." 391 U.S. at 128.

[11]Petitioner states (83-616 Pet. 4) that during the taped conversation Gullett told Leich that "Marvie and I are behind you. We are still with you." This statement does not appear in the verbatim transcript of the

At the outset, we note that petitioner's *Bruton* complaint was not timely raised in the district court. Petitioner received the transcript of the recorded conversation well in advance of trial (C.A. App. 43a-44a). He did not file a pretrial motion seeking redaction of the tape on *Bruton* grounds, and the only objections made at trial before the tape was played focused on racist comments, the vulgar language used, and Gullett's declaration that he would assert a Fifth Amendment privilege before the grand jury (Tr. 295-311). Several days after the tape was played petitioner Fox sought a mistrial, claiming that this evidence was not admissible against him.[12] He also argued that a limiting instruction would not dissipate the clear prejudice he belatedly claimed to have suffered (Tr. 706-707). The district court denied the motion because petitioner had failed to raise the issue at an appropriate time, when the *Bruton* problem might have been avoided (Tr. 709-710). Petitioner's failure to raise the *Bruton* claim supports our position that any prejudicial impact was insignificant. Cf. *United States* v. *Kahaner*, 317 F.2d 459, 482 (2d Cir. 1963).[13]

In any event, as the court of appeals correctly found (Pet. App. A24-A25), there was no prejudice shown here. Indeed, the challenged statements on their face did not particularly inculpate petitioner. The statement to which petitioner

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conversation (Gov't Exh. 68), which petitioner agreed accurately reflected the recording (Tr. 313). Leich's testimony about the subsequent telephone conversation (Tr. 371) comes closest to conveying those words.

[12]The mistrial motion arose after the court acquitted petitioner Fox of obstruction of justice, the charge to which the tape related most specifically.

[13]Additionally, although petitioner made brief mention of the *Bruton* claim to the district court (Tr. 706-707), he did not argue *Bruton* in the court of appeals. Petitioner's sole claim in that forum challenged the earlier introduction of the statements under Fed. R. Evid. 801(d)(2)(E), relating to co-conspirator statements (Fox C.A. Br. 18-27).

most strenuously objects — Gullett's reassurance that he and petitioner were still behind Leich — is more an expression of friendly support than an admission of co-conspirator involvement. Because the statement, and the other references to Fox in the recorded conversation, were not " 'powerfully incriminating' of or 'devastating to' " petitioner, nor were they "clearly inculpatory" and "vitally important" to the government, there was no reversible error. *United States* v. *Marin*, 669 F.2d 73, 83 (2d Cir. 1982), quoting *Bruton*, 391 U.S. at 135 and *United States* v. *Knuckles*, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978); see also *United States* v. *Rubio*, 709 F.2d 146, 155 (2d Cir. 1983); *United States* v. *Winograd*, 656 F.2d 279, 283 (7th Cir. 1981), cert. denied, 455 U.S. 989 (1982); *United States* v. *Halliday*, 658 F.2d 1103, 1105 (6th Cir.), cert. denied, 454 U.S. 1127 (1981); *United States* v. *Tavelman*, 650 F.2d 1133, 1139 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982).[14]

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[14]Petitioner Fox's claim of prejudice rests on the not wholly correct allegation that the statements constituted the only corroboration of co-conspirator Boyer's testimony. Thus, he refers (83-616 Pet. 9) to other evidence against him as "one very brief, only questionably damaging reference to Petitioner in the testimony of Vincent Mancuso." The record shows otherwise. Mancuso, the owner of an insurance agency, called petitioner Fox on behalf of Bruce Eavenson, a fellow agent, about some dividend checks that Eavenson appropriated before they were sent out to the policyholders. Mancuso asked petitioner how these stolen checks could be cashed; petitioner responded that Boyer would cash them for 25% (Tr. 114-116). Subsequently, Boyer met Eavenson and arranged to cash seven stolen dividend checks (Tr. 131-135, 146). Additionally, Davis, the Canadian insurance agent who cashed the checks, testified that Boyer told him that petitioner Fox knew about all the checks (Tr. 598); he also testified that he saw Boyer divide the money among several envelopes (Tr. 599). In short, petitioner's claim that the statements provided the only corroboration of Boyer's overwhelming evidence — whether or not Boyer's testimony was "inherently suspect" — is hyperbole. The claim is also suspect in light of petitioner's failure to make a contemporaneous *Bruton* objection, something he likely would have done if the evidence were as crucial to the prosecution as he now suggests.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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